SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1968

No. [redacted] 188

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr. deceased, substituted in the place and stead of said William B. MacDonald, Jr., now deceased, and NEW AMSTERDAM CASUALTY COMPANY,

Petitioners,

vs.

INTER-CONTINENTAL PROMOTIONS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX

	Page
Citations to Opinions Below	2
Jurisdiction	2
Question Involved	2
Statement of the Case	3
Decision in the Court Below	7
Reason for Granting the Writ	9
Conclusion	11
Certificate of Service	12
Appendix A (Order of Dismissal of United States District Court, Southern District of Florida)	App. 1
Appendix B (Opinion of United States Court of Appeals for the Fifth Circuit)	App. B
Order Denying Rehearing Judgment of U. S. Court of Appeals	App. B
Appendix C (Excerpts of Florida Statutes)	App. C

TABLE OF AUTHORITIES

Cases:	Page
Albertson et al. v. Millard, 345 U.S. 242, 73 S. Ct. 600	10
Aldrich v. Aldrich, 375 U.S. 75, 84 S. Ct. 184 (1963)	10
Bernhardt v. Polygraphic Company of America, 350 U.S. 198, 76 S. Ct. 273, 277	7
Clay v. Sun Insurance Office Limited, 363 U.S. 207, 80 S. Ct. 1222 (1960)	10
Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817	11
United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 82 S. Ct. 676 (1962)	9
Other Authorities:	
§§ 548.01, 548.02, 548.03	5, 7

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Petitioners pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, entered and rendered in the above-entitled case on October 10, 1966, to which a petition for rehearing was denied on May 8, 1968.

CITATIONS TO OPINIONS BELOW

The order of dismissal of the United States District Court, Southern District of Florida, in the case of Inter-Continental Promotions, Inc. v. William B. MacDonald, Jr., and New Amsterdam Casualty Company, No. 65-2-Civ-EC dated April 7, 1965, is unreported, appears in the record at pages 130-133, and is printed in Appendix A hereto.

The opinion of the United States Court of Appeals for the Fifth Circuit dated October 10, 1966, is officially reported at 367 F. 2d, 293 (1966) appears in the record at pages 143-165, and is printed in Appendix B hereto, which also includes Judgment and Order Denying Rehearing.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254, since the matter involved is controlled by the local law of Florida and the appellate courts of Florida have not determined this question of local law which deals with the public policy of the State of Florida and is, therefore, a matter of such importance that it justifies the exercise of the discretionary certiorari power.

QUESTION INVOLVED

Whether the United States Circuit Court of Appeals for the Fifth Circuit ought to initially construe and interpret a state statute in advance of a construction thereof by the courts of the State, especially where a matter of state public policy is involved and the procedural machinery exists to obtain a ruling on state law by the highest court in the state?

STATEMENT OF THE CASE

Muhamad Ali (Cassius Clay) and Charles "Sonny" Liston on February 25, 1964 engaged in a world championship prize fight at the Miami Beach Convention Hall, Miami Beach, Florida. The respondent brought suit in the United States District Court for the Southern District of Florida against the petitioners for the recovery of the purchase price of "certain promotional rights" sold by the respondent to William B. MacDonald, Jr., as disclosed by a contract attached to and made a part of the complaint (R. 5-12).

The attached agreement recites that the respondent "has an exclusive contract with Charles "Sonny" Liston, Heavyweight Boxing Champion of the World, and Cassius M. Clay, Jr., number one contender, for the staging of a Heavyweight Championship Bout between Liston and Clay (R. 5).

The respondent agreed "to produce Charles 'Sonny' Liston and Cassius M. Clay, Jr., on Tuesday, February 25, 1964, . . . at the Miami Beach Convention Hall in Miami Beach, Florida, where they will then and there engage in a boxing contest with each other for fifteen rounds or less, for the Heavyweight Boxing Championship of the World" (R. 6).

The respondent granted MacDonald the right and privilege to promote, stage and handle "the live gate aspect" of the fight (R. 6). The respondent agreed to post $100,000 bond to be paid to MacDonald "if either of said fighters fail to appear and to fight at the agreed time . . . " (R. 7). The respondent agreed to save Mac-

Donald harmless "with respect to the fighters' share of the live gate receipts" (R. 7). MacDonald agreed "for and in consideration of" respondent's "sale of said live gate rights to MacDonald" to pay to the respondent the sum of $625,000 (R. 7).

The fighters were to be made available to MacDonald for promotional purposes prior to the fight "having due consideration to the obligation of said fighters to train in preparation for said contest" (R. 9).

All receipts from televising and broadcasting the bout, and all receipts from moving pictures shown throughout the World were to be retained by the respondent (R. 9). It was agreed that the respondent would have no expense in connection with the promotion of the live gate "except for the payment of the fighters . . . ; each fighter shall bear his own training camp expenses." (R. 10-11).

The complaint alleges that the respondent fully complied with the contract. In other words, the fight was held by MacDonald. The live gate produced $224,695.83, leaving a deficit from the contract price of the live gate of $404,304.17 (R. 3), for which the respondent asked judgment, with interest.

The petitioners moved to dismiss the complaint on the ground that the complaint failed to state a claim upon which relief could be granted and upon the ground that the contract sought to be enforced is illegal (R. 20).

The petitioners contended that the prize fight promoted and held on Tuesday, February 25, 1964, at the

Miami Beach Convention Hall by the respondent and MacDonald constituted a violation of Florida Criminal Statutes 548.01, 548.02 and 548.03. Excerpts of the Florida Statutes cited herein are attached and printed as Appendix C.

Section 548.01 denounces the fight as a felony; Section 548.02 denounces the aid or participation in such fight as a felony; Section 548.03 defines the conduct condemned as follows:

> "By the term 'pugilistic exhibition, encounter, or fight, with or without gloves,' as used in this chapter, is meant any voluntary fight or personal encounter, by blows, between two or more persons, for money . . . "

This definition of the conduct condemned by the statute is for the purpose of differentiating between the condemned conduct and certain conduct not condemned, as set forth in the proviso clause of said section as follows: "provided that nothing contained herein . . . shall be construed as applying to boxing exhibitions held by and under the auspices of the American Legion" and other oganizations such as the YMCA, the Veterans of Foreign Wars, etc.

The deposition of Mr. Garland D. Cherry was taken on February 25, 1965 (R. 81). Mr. Cherry is and was the attorney for the respondent at all times involved in this litigation. He is the secretary of the respondent corporation and a stockholder (R. 83). The deposition was filed on or prior to the 8th day of March, 1965 (R. 125).

After the petitioners' motion to dismiss was filed on January 25, 1965 (R. 20), the respondent, as a matter of course under the rules, on January 28, 1965, filed an amendment to its complaint, which set forth:

> "Said contract concerned the holding and conducting of a pugilistic contest which was to be held on February 25, 1964 between Charles 'Sonny' Liston and Cassius M. Clay, Jr. Said contest was held by and under the auspices of the Veterans of Foreign Wars of the United States and was licensed and/or permitted by the City of Miami Beach, Florida, as a pugilistic exhibition held under the auspices of the Veterans of Foreign Wars of the United States. In this connection, plaintiff specially pleads Florida Statutes Annotated Section 548.03 as being the statutory basis for (a) the legal holding and conducting of said pugilistic encounter, and (b) the legality of said contract." (R. 26-27)

Thereafter, on February 15, 1965, on the regular motion calendar of the trial court, the motion to dismiss was orally argued by counsel for the respective parties. The cause was then again set for oral argument on the regular motion calendar of the trial court on March 15, 1965, and was again orally argued. On April 8, 1965, the trial court rendered its judgment, or order of dismissal (R. 130-133), in which the court found that the fight held by MacDonald and the respondent at Miami Beach violated Sections 548.01 and 548.03 of the criminal statutes of Florida.

The trial court disposed of the amendment filed by holding:

> "In the instant case the contract between the parties called for the promotion of a prize fight. None of the parties to the contract are within the exception provided in Section 548.03 of the Florida Statutes, nor does the contract provide that the fight shall be held under the auspices of one of the exempted organizations." (R. 132)

From this judgment of dismissal the respondent took its appeal to the United States Court of Appeals for the Fifth Circuit.

DECISION IN THE COURT BELOW

The United States Court of Appeals for the Fifth Circuit, by divided court, reversed the trial court and held that the Florida Legislature had "to legalize all prize fights, even title bouts—provided, of course, that the fight was held under proper auspices," and thereby reversed the final judgment of dismissal rendered by the district court. Circuit Judge Coleman, dissenting, said: "I am of the opinion, as the District Judge held, that the contract for the prize fight was illegal on its face. This being a question of Florida law, which more appropriately could have been settled by the courts of that State, I shall refrain from further discussion."

The Hon. Emett C. Choate, the District Judge rendering the opinion dismissing the complaint (R. 130-133) is from the Florida Bar and practiced as an eminent member thereof for many, many years, and "special weight" should be accorded "to his statement of what the [Florida] law is." *Bernhardt v. Polygraphic Company of America, 350 U.S. 198, 76 S. Ct. 273, 277.*

Circuit Judge Wisdom is from the Louisiana Bar (New Orleans); Circuit Judge Coleman is from the Mississippi Bar, and the third member of the panel, District Judge Sarah Hughes is from the Texas Bar.

In view of Judge Wisdom's elaboration of the historical background of prize fights, glove contests and boxing exhibitions, petition for rehearing filed November 12, 1966 (R. 174-193), denied May 8, 1968 (R. 195), demonstrated that the Florida Statutes condemning prize fights as felonies grew out of a bitter contest between the Governor of the State of Florida and promoters of a fight between "Gentleman Jim" Corbett, heavyweight champion of the United States, and Charley Mitchell, champion of England, which occurred in Jacksonville, Florida on January 25, 1894. It is clear from the circumstances surrounding the enactment of Sections 548.01, 548.02 and 548.03 that the purpose of the statutes was to condemn heavyweight championship fights such as the one between Muhamad Ali and Charles "Sonny" Liston.

In addition to the petition for rehearing the petitioners filed a motion for rehearing en Banc (R. 169-172) and a request for the certification of the novel questions involved in the interpretation of these statutes to the Supreme Court of Florida, in view of the fact that there are "no controlling precedents in the decisions of the Supreme Court of Florida . . .". This motion was apparently never ruled on by the court below.

REASON FOR GRANTING THE WRIT

The Supreme Court of the United States in *United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 82 S. Ct. 676 (1962)*, vacated a judgment of the Circuit Court of Appeals initially interpreted certain state legislation. In so doing, the Supreme Court said:

> "The interpretation of state law by the Court of Appeals, in an opinion by its Alabama member, was rendered in advance of construction of the License Code by the courts of the State, which alone, of course, can define its authoritative meaning. We ought not, certainly on this record, either accept the Court of Appeals' construction or, on an independent consideration, reject what the Alabama Supreme Court may later definitively approve. The availability of appropriate declaratory-judgment proceedings under Ala. Code, Tit. 7, §§ 156-168 (1940), avoids this unsatisfactory dilemma. Wise judicial administration in this case counsels that decision of the federal question be deferred until the potentially controlling state-law issue is authoritatively put to rest. See Leiter Minerals, Inc., v. United States, 352 U.S. 220, 228-229, 77 S. Ct. 287, 1 L. Ed. 2d 267. Accordingly, the judgment of the Court of Appeals is vacated to permit a construction of the License Code of the City of Mobile, so far as relevant to this litigation, to be sought with every expedition in the state courts. It is so ordered. * * *"

In the case of *Albertson et al. v. Millard, 345 U.S. 242, 73 S. Ct. 600*, the Supreme Court of the United States sent the case to the state court for an interpretation of state legislation.

In the case of *Clay v. Sun Insurance Office Limited, 363 U.S. 207, 80 S. Ct. 1222 (1960)*, the Supreme Court of the United States vacated a judgment of the Court of Appeals of the Fifth Circuit and required that the case be sent to the Supreme Court of Florida to obtain from that court an interpretation of Florida Statute 95.03.

In the case of *Aldrich v. Aldrich, 375 U.S. 75, 84 S. Ct. 184 (1936)*, the Supreme Court of the United States certified to the Supreme Court of Florida a question of Florida law that was determinative of the cause then before the Court.

As pointed out by the District Judge in the case at bar, if the exemptive clause of the criminal statute is to be given the force and effect contended by the Circuit Court of Appeals for the Fifth Circuit, then a serious constitutional question becomes involved of whether the exemption offends the Constitution of the United States because of an unreasonable classification of the persons exempted from the statute.

The statutes involved are criminal statutes. They deal with felonies. They reflect the public policy of the State of Florida as promulgated by its legislature. The first fatality that occurs during a prize fight in Florida would evoke a hue and cry for prosecutions under these statutes. If their effectiveness or meaning is to be curbed or postulated by judicial interpretation then, under the rule of law enunciated by the Supreme Court of the United States, the question should be presented to the Supreme Court of Florida for its initial interpretation.

It is respectfully submitted that in this case the Supreme Court of the United States is again squarely presented with the issue and has the opportunity to bring to an end the hesitancy and diffidence of the United States Court of Appeals to submit questions of local law to the Supreme Court of the state involved. It is a matter of the gravest significance to the relationship between the state and federal judicial systems, under the doctrine established in *Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817*, that a writ of certiorari be issued in this case.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted and the judgment of the United States Court of Appeals for the Fifth Circuit should be vacated and the cause forthwith remanded for submission on the questions of State law to the State Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed first class, postage prepaid, to Mallory H. Horton, 308 Concord Building, Miami, Florida 33130, attorney for respondent, Inter-Continental Promotions, Inc., this day of June, 1968..
